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In The

Supreme Court of the United States

Nos. 74-18 and 74-611

SOLOMON FISHER, *et al.*,
Petitioners,

vs.

UNITED STATES, *et al.*,
Respondents.

UNITED STATES, *et al.*,
Petitioners,

vs.

C. D. KASMIR, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

Interest of Amicus Curiae

The American Bar Association is an association of attorneys who render legal assistance to individuals as well as other clients. The cases here involved will directly affect the relationship between attorneys and their individual clients because the standing of an attorney to raise the constitutional privilege against self-incrimination on behalf of his client and the forfeiture of a client's Fifth Amendment privilege on the transfer of books and papers in the

client's possession to an attorney for the purpose of obtaining legal advice, are in issue. Amicus has a direct interest in any decision which would deprive an individual of his Fifth Amendment privilege for having consulted his attorney.

Questions Presented

1. Does a taxpayer-client divest himself of possession for the purposes of the Fifth Amendment privilege when to obtain legal advice he transfers books and papers to his attorney, or is the attorney's possession the constructive possession of the taxpayer-client entitling him to the protection of the privilege?

2. If a taxpayer under investigation by the Internal Revenue Service consults an attorney and for the purpose of obtaining legal assistance delivers to him books and papers which the taxpayer-client had in his possession, does the attorney have the same standing to raise the Fifth Amendment privilege on behalf of his client as the client would have if the books and papers had remained in the client-taxpayer's actual possession?

ARGUMENT

The Constitutional Privilege Against Self-Incrimination is Neither Diminished Nor Forfeited when a Taxpayer-Client Transfers Books and Papers to his Attorney for the Purpose of Obtaining Legal Assistance.

In both cases at bar, taxpayers consulted attorneys before any process in the form of an administrative summons had been served and in *Kasmir* after an Internal Revenue Service criminal investigation had begun. For the purpose of obtaining legal advice, taxpayers transferred to their attorneys, Petitioner Fisher and Respondent Kasmir, papers[1] which the taxpayers had in their possession after receiving them from their accountants. The Government claims that taxpayers who sought professional legal assistance forfeited their Fifth Amendment privilege when they left the papers with their attorneys for the purpose of obtaining legal advice. The Fifth Circuit properly rejected this argument in *Kasmir* and held that an attorney could claim the Fifth Amendment privilege on his client's behalf with respect to the papers and other records the client transferred to the attorney for the purpose of obtaining legal assistance. The Third Circuit did not reach this issue in *Fisher*, upholding enforcement for lack of sufficient possession under the *Couch* rule[2] to permit privileged status to attach to the papers transferred to the attorney.

That the confidentiality of the relationship between an attorney and his client is vital to the functioning of the American system of law is too time-honored to belabor. The attorney serves a client as both adviser and advocate, duty-bound under the rules of his profession "to represent a client zealously within the bounds of law" and "to secure and protect [for the client] available legal rights and benefits." American Bar Association, Code of Professional Responsibility, Canon 7, EC 7-1. Society's laws have long since become so complex that the average person requires from time to time the advice and the assistance of his attorney. "Even the intelligent and educated layman has small and sometimes no skill in the science of the law." *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Johnson* v. *Zerbst*, 304

1. In *Fisher*, but not in *Kasmir*, there is a dispute between the parties as to whether the papers prepared by the accountant were "accountant's workpapers." Since we are not taking a position in this dispute, we will refer to the items simply as "papers."

2. *Couch* v. *United States*, 409 U.S. 322 (1973).

U.S. 458 (1938). Also because of the complexity of law, the attorney-advocate is recognized in American courts as his client's spokesman. In fact, "If in any case, civil or criminal, a state or federal court were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore of due process in the constitutional sense . . ." *Powell* v. *Alabama, supra.*

To provide meaningful professional legal assistance, however, the attorney must be free to bring to bear on his client's problems the skills, experience and judgment he possesses. Frequently, he can do this only if he knows all that his client knows concerning the facts. Otherwise, he may give his advice without important information, neglect a valuable defense, or be unaware of evidence that might be damaging to his client's legal position. Since the client is not competent to evaluate the relevance or significance of facts, the attorney must, therefore, insist on full and candid disclosure. It is to encourage this full and candid disclosure that the law recognizes and the attorneys rules of conduct require that an attorney must preserve confidences and secrets disclosed by the client for the purpose of obtaining professional aid or advice. See American Bar Association, Code of Professional Responsibility, Canon 4. See also *Chirac, et al.* v. *Reinicker,* 11 Wheat (24 U.S.) 280, 291 (1826); *Connecticut Mutual Life Insurance Company* v. *Schaefer,* 94 U.S. 457, 459; *United States* v. *Louisville & Nashville R.R. Company,* 236 U.S. 318, 336 (1915); VIII Wigmore, Evidence (McNaughton rev., 1961) § 2290.

Furthermore, the attorney must be able to perform his function free from interference. This freedom from interference is necessary not only if the attorney is to be able

to obtain a full and complete disclosure of all the facts from his client, but also if he is to be able to handle the matter intelligently and competently from the administrative stage to a trial, if necessary. In short, without complete disclosure of all facts pertinent to the matter on which he is consulted, the attorney will be unable to fulfill the role of the truly professional adviser and advocate. See American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft, 1970) pp. 147 and 201.

In a criminal tax investigation, the suspect's need for professional legal assistance becomes vital.[3] If law in general is complex, the tax law is exceedingly so, and especially when, as in the cases under consideration, it is weighted with the implication of potential criminal prosecution and loss of liberty. Moreover, in a tax matter, the client's communications to his attorney for the purpose of obtaining legal advice are likely to be—indeed necessarily must be—in the form of papers, books and records. The client cannot make full and free disclosure to his attorney of all that is relevant if the attorney cannot have ready access to his client's books and records, nor can the attorney otherwise render meaningful and effective legal assistance on the matter as to which he is being consulted. More fundamentally, a rule that a client's constitutional privilege is diminished or forfeited as a consequence of his having consulted, and revealed privileged information to, his attorney would utterly destroy the attorney-client relationship

3. The Internal Revenue Service itself recognizes the importance of counsel during a criminal tax investigation. It requires its special (criminal) agents to advise a taxpayer under investigation that he has a right to consult an attorney. News Release, IR 949, Nov. 26, 1968; News Release, IR 897, Oct. 3, 1967. In *Kasmir* such a warning had been given.

and prevent the usefulness and benefits to be derived from professional assistance. See Mechem on Agency, 2d ed., Vol. 2, sec. 2297.

In the cases under consideration, *Amicus* does not take a position on whether a taxpayer is entitled to claim the Fifth Amendment privilege with respect to papers prepared by an accountant under the circumstances involved here. We take it as established, furthermore, that no person may *enlarge* his constitutional privilege by the mere expedient of transferring records to his attorney. *Couch* v. *United States,* 409 U.S. 322 (1973). Thus when the client himself would be unable to raise the Fifth Amendment privilege with respect to particular records, the attorney having possession of those records is bound to produce them. But if the client himself would be privileged from producing the records, had the records remained in the client's hands, the attorney having possession of the records should not be required to produce them. *United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963), *cert. den.* 371 U.S. 951 (1963); *Brody* v. *United States,* 243 F.2d 378 (1st Cir. 1957), *cert. den.* 354 U.S. 923 (1957) but cf. *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963). However, we do not believe that the attorney-client relationship can long survive a rule that would diminish an individual's Fifth Amendment privilege for having consulted an attorney and for having delivered papers and records to the attorney to obtain legal assistance.

In view of the foregoing, *Amicus* supports the result reached by the Fifth Circuit in *Kasmir* that a taxpayer does not forfeit his Fifth Amendment privilege when he transfers accounting workpapers to his attorney for the purpose of obtaining legal advice. The Third Circuit in *Fisher* did not squarely decide that a taxpayer loses his Fifth Amendment privilege solely by reason of the transfer of records

to his attorney; however, *Amicus* does oppose any implication in the decision that Fifth Amendment rights were lost by reason of the transfer to the attorney which would have existed had possession remained in the client.

a. When taxpayers transfer records to their attorneys, the records remain in the constructive possession of the taxpayers for Fifth Amendment privilege purposes

In the context of the *Couch* case, what we urge means that a taxpayer-client retains constructive possession of any records he transfers to his attorney for the purpose of obtaining legal assistance. This Court said in *Couch,* 409 U.S. at 333:

> "We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact."

After the commencement of a criminal investigation of their tax returns but prior to the service of any summons, the taxpayers involved in these cases obtained actual possession of papers prepared by their accountants when their accountants voluntarily transferred the papers to them. Later,[4] the taxpapers transferred the same records to their attorneys for the purpose of obtaining legal assistance.

4. In *Fisher,* the taxpapers obtained the papers on August 4 or 5, 1971, and delivered them to their attorney, Fisher, on August 17, 1971. In *Kasmir,* the taxpapers obtained the records on January 4, 1973, and delivered them to their attorney, Kasmir, the same day.

When the taxpayers obtained actual possession of the papers from their accountants, however, they did not divest themselves of that possession by transferring the papers to their attorneys. A taxpayer's transfer of his records to his attorney must be one of those "clear" situations anticipated in *Couch* where constructive possession remains in the taxpayer-client if the taxpayer-client is not to lose his privilege for having consulted an attorney and the attorney-client relationship is to survive.

A taxpayer retains constructive possession of the records he transfers to his attorney because the taxpayer-client retains dominion and control over any records transferred to the attorney. For this purpose the attorney is the client's agent, and the possession of the agent is the constructive possession of his principal. The client's decisions affecting the records turned over to him are binding on the attorney. Obviously if the client wants his papers back, the attorney must return them. The American Bar Association Code of Professional Responsibility provides (EC 7-7):

> "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make a decision is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."

Moreover, when the taxpayers transferred the papers to their attorneys they had a right to expect that this information would be kept confidential because an attorney is bound to preserve the confidences and secrets of his client. As the Fifth Circuit said in *Kasmir,* 499 F.2d at 453:

> ". . . [W]here the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, the taxpayer's legitimate expectation of privacy with regard to the use of the materials should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns. While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than and independent of the attorney-client privilege,[6] which is admittedly not available here. The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association absolutely forbid an attorney from knowingly revealing either a 'confidence' or a 'secret' of his client. A 'confidence' refers to information protected by the attorney-client privilege while a 'secret' refers to any other information 'gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' ABA Code of Professional Responsibility, DR 4-101(A), (B)(1). Of course, the taxpayer cannot assert the attorney-client relationship, as distinguished from the attorney-client privilege, as a basis for denying enforcement of the summons. But even where there is no attorney-client privilege in certain material, as here, the taxpayer client may still have a legitimate expectation of privacy with regard to that material because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention.

6. The ABA Code of Professional Responsibility, Ethical Consideration 4-4 provides in part:

> 'The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.' "

Thus, as Justice Marshall said in his dissent in *Couch* (409 U.S. at 350): "A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given."

The instant cases are distinguishable from the situation in *Couch,* therefore. In *Couch,* the accountant was bound to disclose on tax returns and in audit the matters contained in records the taxpayer had left in his possession not only for a long period of time but even until after he had been served with a summons. In the instant cases, the records were delivered to the attorneys prior to service of summons and the attorneys to whom the records were transferred were bound *not* to disclose the matters contained in the records and were not retained to prepare tax returns but to assist the taxpayers by rendering legal advice or preparing their defense.

Unlike the Fifth Circuit in *Kasmir,* the Third Circuit adopted an "aging" rule in *Fisher* that unless the records are in the possession of the taxpayer for an extended period of actual possession, they do not have (500 F.2d at 692):

> "the legal capacity to generate a subsequent right of constructive possession of sufficient intensity to elevate those records into the required category of . . . 'private books and papers'. We are unwilling to attribute a Fifth Amendment protection to the accountant's work product based on such a limited possession by his client."

Amicus submits that, since possession by an attorney is one of those "clear" situations of a taxpayer's constructive possession, the taxpayer cannot limit his possession by transferring records to his attorney. The fact that he had the records only a short time before the transfer is irrelevant. Moreover, we have been able to find neither authority nor logical support for the proposition that a waiting period is a prerequisite to the exercise of the constitutional privilege.

b. An attorney to whom accountants' papers have been transferred by a taxpayer for the purpose of obtaining legal advice has standing to plead the Fifth Amendment privilege in his client's behalf

The same considerations which establish the importance of the attorney-client relationship and the client's constructive possession of books and records he transfers to his attorney are the basis also for the rule that the attorney has standing to raise his client's Fifth Amendment privilege claim with respect to twice transferred records. The Fifth Circuit in *Kasmir* properly followed the rule, enunciated by a majority of the courts of appeal which have considered the issue, that although the privilege is a personal one, an attorney may claim the Fifth Amendment privilege on his client's behalf. *United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963), *supra; Colton* v. *United States,* 306 F.2d 633 (2d Cir. 1962); see also, *Grant* v. *United States,* 227 U.S. 74 (1913), *affirming* 198 Fed. 708 (S.D.N.Y. 1912); VIII Wigmore, Evidence (McNaughton rev., 1961), sec. 2307; but see *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963), *supra.*

It is manifest that "the very nature of the tax law requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their client's financial affairs." *United States* v. *Judson, supra,* 322 F.2d at 468. A rule which ignores these "realities" and requires a taxpaper to be present whenever and wherever the attorney requires the records for the purpose of rendering legal assistance and to reclaim these records at the end of each

session with his attorney in order to be able to claim the privilege, would impose a heavy burden on the functioning of the attorney-client relationship. This result would be undesirable as a matter of policy, and, to the extent that it imposes on the taxpayer "the choice of attending hearings or investigations, sometimes carried on over considerable periods of time, or waiving his privilege against self-incrimination," would establish a constitutionally intolerable penalty to the exercise of the privilege. *United States* v. *Judson, supra,* 322 F.2d at 468; *Application of House,* 144 F.Supp. 95, 100 (N.D.Cal. 1956).

Confidentiality of communications between client and attorney and the resulting protection against disclosure by the attorney have a long and illustrious history of judicial acceptance, as noted in *Chirac, et al.* v. *Reinicker,* 11 Wheat. (24 U.S.) 280, 291 (1826), *supra; Connecticut Mutual Life Insurance Company* v. *Schaefer,* 94 U.S. 457, 459 (1877), *supra; United States* v. *Louisville & Nashville R. R. Company,* 236 U.S. 318, 336 (1915), *supra.* It should be noted furthermore that reasons of policy which require an attorney to claim the attorney-client privilege in behalf of his client (American Bar Association, Code of Professional Responsibility, Canon 4, EC (4-4) similarly would seem to require the attorney to claim any Fifth Amendment privilege of his client with respect to records transferred to him in confidence and for legal advice. If the professional obligation of the attorney to represent a client zealously within the bounds of the law presumptively requires the attorney to claim the evidentiary privilege on his client's behalf, surely this professional obligation requires the attorney to claim the Fifth Amendment privilege on his client's behalf unless there is evidence to the contrary. American Bar Association Code of Professional Responsibility, Canon 7, EC 7-1. *See United States* v. *Judson, supra,* 322 F.2d at 468.

Despite these considerations of reason and policy, the Eighth Circuit in *Bouschor* v. *United States, supra,* has held that an attorney does not have the right to assert on behalf of his client the Fifth Amendment's privilege against self-incrimination. In *Bouschor* a Revenue Agent had examined in the course of a civil audit the workpapers taxpayer's accountants had in their files. Subsequently, after an attorney was retained and the case had been transferred to a Special Agent for purposes of a criminal investigation, the workpapers were transferred to the attorney at the taxpayer's direction made through his attorney. Under these circumstances, the Eighth Circuit considered the accountant's workpapers to be in the attorney's possession not in a "personal" but a "representative" capacity, and held, therefore, that the attorney did not have standing to claim the Fifth Amendment privilege which must be claimed in person.

The "personal-representative" dichotomy from which the Court reasoned does not apply in a situation where an attorney holds records for a client. This dichotomy has developed from cases where criminal activity of an agent of a collective group is suspected. In this context, this Court has held that, "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *United States* v. *White,* 322 U.S. 694, 698 (1944). Thus, the privilege cannot be utilized by such organizations as corporations (*Hale* v. *Henkel,* 201 U.S. 43 (1906); unincorporated associations (for example, a union) *United States* v. *White, supra*); and more recently, a partnership (*United States* v. *Bellis,* 417 U.S. 85, 40 L.Ed.2d 678 (1974)). Moreover, individuals, when acting as "representatives" of these corporations or impersonal collective groups, "cannot be said to be exercising their personal rights and duties nor to be entitled to

their purely personal privileges." *United States* v. *White, supra,* 322 U.S. at 699. Consequently, the official records and documents "of the organization" cannot be the subject of the personal privilege against self-incrimination even if these records and documents incriminate their custodian personally. *Wilson* v. *United States,* 221 U.S. 361 (1911) (custodian of corporate records); *Grant* v. *United States, supra* (custodian of dissolved corporation's records); *United States* v. *White, supra* (custodian of union's records).

The reason for this rule was stated in *United States* v. *White* as follows (322 U.S. at 700):

> "The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations."

This description of the reason for the developed distinction between possession in a "representative" as opposed to a "personal" capacity makes it obvious that the distinction

does not apply to an attorney who holds records of his client. *United States* v. *Cohen,* 388 F.2d 464, 467 (9th Cir. 1967). The accountant's papers involved here are not "independent" in the sense that term is used in *White. United States* v. *Judson, supra,* 322 F.2d at 466. On the contrary, these papers were summaries and analyses which were entirely dependent upon the existence of the financial records of the individual taxpaper (not a collective group) on behalf of whom the privilege was claimed. Nor were the attorneys here "representatives" in the *White* sense because the "rights, duties and privileges" which they assumed as agents for their taxpayer-clients and by which they are bound, *include* the privilege against self-incrimination. See *United States* v. *White, supra,* 322 U.S. at 699. Moreover, the *Bouschor* court totally ignored the special attorney-client relationship described above. By contrast, the Ninth Circuit in *Judson* said (322 F.2d at 467):

> "The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defense his client has. No other 'third party', nor 'agent', nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry."

Accordingly, if the attorney-client relationship is to be preserved, an attorney must have standing to raise his

client's Fifth Amendment privilege with respect to books and papers the client has transferred to the attorney for the purpose of obtaining legal assistance.

Conclusion

In view of the foregoing, *Amicus* American Bar Association submits that this Court in deciding the two cases here involved should hold that whatever Fifth Amendment privilege a client has with respect to books and records in his possession is not lost by delivering them to his attorney for the purpose of obtaining legal assistance and that in such circumstances the attorney has standing to raise whatever Fifth Amendment privileges would be available if the books and records were still in the possession of the client.

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